No. 42298-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

AARON HUDSPETH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Paula Casey, Judge
Cause No. 11-1-00182-6

BRIEF OF RESPONDENT

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2. Whether the trial judge's denial of Hudspeth's Motion for New Attorney constituted an abuse of discretion.

3. Whether Hudspeth's attorney's performance was deficient. If Hudspeth's attorney's performance was deficient, whether it was prejudicial to Hudspeth's case.

4. Whether the evidence was sufficient to prove that Hudspeth was "armed" with a firearm.

5. Whether the firearm enhancements were properly charged, and whether the jury found that Hudspeth was armed with a firearm at the time the crimes were committed.

B. STATEMENT OF THE CASE.

1. Procedural History

On April 4, 2011, the State charged Aaron Michael Hudspeth with two counts of unlawful possession of a firearm in the first degree, RCW 9.41.040(1)(a), one count of unlawfully possessing methamphetamine with an intent to deliver "while armed with a deadly weapon – firearm," RCW 69.50.401(2)(b); RCW 9.94A.825; RCW 9.94A.533(3), and one count of unlawfully possessing

marijuana with an intent to deliver "while armed with a deadly weapon – firearm," RCW 69.50.401(2)(c); RCW 9.94A.825; RCW 9.94A.533(3). [CP 2-3]

On June 13, 2011, the court heard Hudspeth's Motion for New Attorney and Motion to Suppress. 06/13/11 RP 4, 8. Asking that the court appoint him different counsel, Hudspeth alleged that he had only seen his attorney "for a whole three minutes." Id. at 4. Hudspeth went on to explain that while he liked his attorney, he felt like he was being ignored and that he would therefore be unable to receive "a decent case." Id. at 4-5. Hudspeth also alleged that, among other things, his attorney forgot to file a brief in support of his CrR 3.6 hearing. Id. at 5. Hudspeth's attorney responded, asserting that he did prepare a brief, that he filed it with the court, and that he sent a copy to Hudspeth. Id. His attorney also said that he was "prepared to go forward with the 3.6 hearing," and that he was "adequately prepared for trial." Id. at 5-6.

The judge denied Hudspeth's motion for appointment of a new attorney, stating that there was no evidence of either "an ethical conflict" or that Hudspeth's attorney was not prepared to move forward. Id. at 6. The judge also noted that Hudspeth's attorney had previously demonstrated himself as an effective

advocate, that his attorney had filed his brief with the court, and that appointing different counsel would delay Hudspeth's trial—as his motion was made just a week before his trial's start date. Id. at 6-7.

At Hudspeth's suppression hearing, his attorney attacked the warrant itself, alleging that because "[t]he search warrant did not authorize search or seizure of firearms," the officers' search violated the particularity requirement. [CP 32] Hudspeth's attorney also argued that the officers opened a locked container before the addendum to the search warrant was granted, which he claimed gave the officers the authority to open the locked container. 06/13/11 RP 48.

The trial court rejected both of Hudspeth's arguments, finding that the officers properly seized Hudspeth's firearms under either the terms of the search warrant or the plain view doctrine. Id. at 56-58. As to the drugs in the locked container, the judge also found that they were properly seized under the warrant. Id. at 59. But even if the warrant did not allow the officers to seize the drugs, the judge emphasized that the addendum giving the officers permission to open the locked container was issued before it was opened. Id. at 60-61.

Hudspeth's trial began on June 21, 2011. 06/21/11 RP 6. On June 22, 2011, the jury found him guilty of all charges except for the charge of unlawfully possessing marijuana with intent to deliver. [CP 5] On June 28, 2011, Hudspeth was sentenced to 120 months of total confinement. Id. at 5, 9. He timely appealed.

2. Statement of Facts

In the early morning hours of February 3, 2011, Officer Bryant Finch was patrolling near the 5800 Block of Henderson Boulevard, and noticed a vehicle that displayed expired tabs, that turned without signaling, and that stopped at an address known for its heavy drug traffic. [CP 43-44] Officer Finch had previously made several drug related arrests at the address,[1] and had been told by the property's owner that "people [were] both selling narcotics here" and "coming here to buy narcotics."[2] Id. at 44.

The vehicle that piqued Officer Finch's interest was driven by Bruce Barker; Natausha Olsen was riding in the passenger seat. Id. Before Officer Finch arrived at their vehicle, he saw Olsen get out and walk onto the property, towards a detached garage.

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[1] In fact, all of the officers that testified at Hudspeth's trial said they were familiar with Hudspeth's address. See, e.g., 06/21/11 RP 119 ("We'd been out there multiple times for warrants and narcotics-related investigations.").

[2] The owner of the property, KC Thomas, had given police permission to come onto his property "anytime . . . to make sure criminal activity was not occurring." CP 35; see also 06/21/11 RP 29.

06/21/11 RP 33. Officer Finch approached the parked vehicle and asked Barker, who had gotten out of the car but had not followed Olsen, for some identification. Id. at 33. Barker complied, presenting a Washington State driver's license. [CP 44] A check of Barker's license indicated that it was suspended and that Barker had a felony warrant out for his arrest. 06/21/11 RP 34. Officer Finch subsequently placed Barker under arrest. Id. at 35.

While Officer Finch was talking with Barker, Olsen returned from the detached garage. Id. at 34. Officer Finch asked Olsen what she was doing at the property and suggested that Officer Ty Hollinger, who had just arrived, retrace Olsen's steps. Id. at 35-36, 118. Officer Hollinger walked over the path that Olsen had just walked, and discovered a purse that had been placed near the doorstep of the detached garage. CP 45; 06/21/11 RP at 36. Notably, the purse contained a credit card with Olsen's name on it, meth, drug paraphernalia with meth and marijuana residue, and a scale. Id. at 37-38; CP 45.[3] At trial, Officer Hollinger stated that it appeared as though the purse had recently been placed by the garage: "What I noticed about the purse was that it seemed very

[3] While Olsen initially told the officers that the purse did not belong to her, she eventually admitted that it was her purse. [CP 45.]

much out of place in that the ground was wet and the surrounding items, including the rack, were also wet." 06/21/11 RP 120. Officer Finch placed Olsen under arrest. Id. at 44.

After Officer Finch read Olsen her *Miranda*[4] rights, Olsen stated that she wished to waive them and began speaking to the officers. [CP 45] Olsen told police that she had been using meth "heavily" for the past few months, and that she was buying meth from Hudspeth in order to repay her dealer, who she said was named "Larry." Id. Olsen said that she owed Larry about $200, id.; that she had bought meth from Hudspeth for Larry the previous night, id. at 46; and that Larry had asked her to buy more meth from Hudspeth that night. Id. Olsen also told the officers that she "observed two handguns" the last time she was buying drugs at Hudspeth's, id. at 46-47, and that she believed Hudspeth was currently in his detached garage, 06/21/11 RP 124. KC Thomas, who owned the property where Hudspeth's home was located, confirmed that the detached garage was Hudspeth's home. [CP 46]

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[4] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)

Barker also agreed to waive his *Miranda* rights, telling the officers—away from Olsen—that Olsen owed her dealer money, that he drove Olsen to the property to buy narcotics, and that Olsen had been to Hudspeth's "at least twice before to purchase narcotics." Id. Based on his previous dealings with Hudspeth, Officer Finch also knew that Hudspeth was a convicted felon. 06/21/11 RP 43.[5]

Acting on what he saw, what Olsen and Barker told him, what the property's owner told him, and what he already knew, Officer Finch applied for and was granted a warrant to search the detached garage, which was also Hudspeth's home. [CP 41-47]

In relevant part, the search warrant stated that probable cause existed to believe that the crime of "Possess/Deliver/Possess with Intent to Manufacture or Deliver/Manufacture Controlled Substances" had been committed. Id. at 52. The warrant specifically described Hudspeth's garage, and as Hudspeth's brief details, the search warrant gave the officers permission to seize controlled substances, paraphernalia, equipment, notes, records,

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[5] At trial, the parties agreed to stipulate as to Hudspeth's past felony conviction: "The defendant, Aaron Hudspeth, has previously been convicted of the crime of residential burglary, which is a serious offense. . . ." 06/22/11 RP 154.

ledgers, money, negotiable instruments, and all weapons, among other things. Id.

About an hour after the initial warrant was granted, Officer Finch called the judge again to ask for an addendum to open "all locked storage containers." [CP 48-49] The judge replied, saying that "based on your last statement that you provided earlier this morning . . . I'll authorize the warrant for those items as well." Id. at 49.

Armed with rifles, shotguns, and a ballistic shield, the officers[6] knocked on Hudspeth's door, announced that they had a search warrant, and requested that everyone inside come out with their hands up. 06/21/11 RP 46. After three or four minutes of silence, Hudspeth responded and came out of his home with his hands in the air. Id. at 46-47. Hudspeth's girlfriend, Lynn Barney, followed Hudspeth out. Id. at 49, 125.

Once the officers were sure that no one else was inside, the officers entered Hudspeth's home, id. at 50; finding a futon, men's clothing, food, a surveillance camera, an LCD camera, a monitor, several police scanners, and some "military equipment including a

[6] At this point, Officer Russell Mize—a K-9 handler—was also present. 06/21/11 RP 43-44; 06/22/11 RP 160.

body armor carrier," id. at 58-59; 06/22/11 RP 184. The officers also found a semi-automatic handgun and a revolver in an unlocked container, id. at 63-64;[7] a large quantity of marijuana, id. at 70; and methamphetamine, packaging material, and a scale, id. Hudspeth's home—where each item was found—was extremely small, "maybe like nine-feet-by-six-feet." Id. at 50; see also id. at 102-03.

C. ARGUMENT.

1. The affidavit for the search warrant for Hudspeth's residence provided sufficient facts to enable a reasonable magistrate to find probable cause; the warrant was drawn with sufficient particularity to satisfy both the Fourth Amendment and article I, section 7, of the Washington constitution.

a. The search warrant was based on probable cause because the facts contained in Officer Finch's affidavit established a "probability" that Hudspeth was selling drugs.

Generally, a "search is reasonable if it is executed with a lawfully issued warrant and based on probable cause." State v. Grenning, 142 Wn. App. 518, 531, 174 P.3d 706 (2008)(citing Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973)). "Probable cause is established when an

[7] Testimony indicated that at least one of Hudspeth's handguns was loaded. 06/21/11 RP 129.

affidavit supporting a search warrant provides sufficient facts for a reasonable person to conclude there is a probability the defendant is involved in the criminal activity." State v. Vickers, 148 Wn.2d 91, 108, 59 P.3d 58 (2002)(citing State v. Young, 123 Wn.2d 173, 195, 867 P.2d 593 (1994); State v. Cole, 128 Wn.2d 262, 286, 906 P.2d 925 (1995)). Therefore, "probable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched." State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999)(citing State v. Goble, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)).

Facts that—standing alone—do not support probable cause may still constitute probable cause when viewed together with other facts. Cole, 128 Wn.2d at 286. Magistrates may draw commonsense inferences from the facts presented in an affidavit and need not examine the affidavit in a hypertechnical manner. State v. Creelman, 75 Wn. App. 490, 494, 878 P.2d 492 (1994). Lower courts' rulings regarding the facts to support a search are given great deference on appellate review, but their determinations of whether such facts constitute probable cause are subject to *de novo* review. In re Detention of Petersen, 145 Wn.2d 789, 799-800, 42 P.3d 952 (2002)(*superseded on other grounds*)(citing Ornelas v.

U.S., 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996)); see also State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) ("we note the great deference that is to be given the trial court's factual findings.").

Hudspeth claims that in his case, the affidavit lacked probable cause for a number of items listed in the warrant. Appellant's Brief at 12. Examples like the court's discussion in Cord, however, refute Hudspeth's argument. See Cord, 103 Wn.2d at 366.

> Here, the affidavit set forth that the affiant was a police officer with 13 years' experience in the Stevens County Sheriff's Department. He had completed marijuana identification school and had attended numerous drug identification seminars. He had experience identifying marijuana in all stages of its growth; and he had identified patches of marijuana from an airplane on 10 prior occasions each of which resulted in the seizure of marijuana. The affidavit then set forth that the affiant had conducted a flyover of appellant's property and had "observed and identified the marijuana growing in a field on the above described property." It then described the precise area to be searched and the location of the marijuana. There is nothing speculative about the affiant's statements here. They provided a sufficient basis for the issuing judge to conclude that a crime was probably being committed.

Id. (cites and emphasis removed from original). Similar to Cord, the facts in this case that indicate that there was a probability that

Hudspeth was conducting criminal activity within his home are overwhelming:

- Officer Finch had extensive training and experience dealing with narcotics, [CP 43.];
- He observed a vehicle with expired tabs, that had just turned without signaling, pull into an address known for its heavy drug traffic, id. at 43-44;
- He had already made several drug related arrests at the address, id. at 44;
- Both Olsen and Barker confirmed that they were at the address to buy drugs from Hudspeth, id. at 46;
- Barker was driving under a suspended license and had a felony warrant out for his arrest, id. at 44;
- Officer Hollinger found Olsen's purse by Hudspeth's home, which contained meth, drug paraphernalia, and a scale (among other things), id. at 45;
- Olsen told the officers that Hudspeth lived in the detached garage, id. at 45-46;
- Olsen said she had bought drugs from Hudspeth the night before, which Barker independently confirmed, id. at 46;
- The property's owner also told the officers that Hudspeth lived in the detached garage, id. at 46;
- Olsen said that she had previously observed two handguns when she was in Hudspeth's home, id. 47; and
- Officer Finch knew that Hudspeth was a convicted felon, 06/21/11 RP 43.

These facts most certainly establish a probability that Hudspeth was dealing controlled substances out of his home.

Hudspeth claims that, specifically, Officer Finch's affidavit "did not include any information establishing the existence or location of any "[n]otes and/or records and/or ledgers . . ."" because neither Olsen nor Barker said they saw "any notes, records,

ledgers, computers, or other electronic media." Appellant's Brief at 12-13. He also says the affidavit failed to state (or Olsen and Barker never mentioned) "records evidencing income," "assets," or "monies, negotiable instruments, and/or other proceeds. . . ." Id. at 13-14.

But this argument misses the point, demonstrating a fundamental misunderstanding of what constitutes probable cause—which is established when there is a "probability" that criminal activity is occurring. See Vickers, 148 Wn.2d at 108. Officer Finch's affidavit asserts facts that establish probable cause for each item listed in the warrant—and whether Olsen and Barker had previously seen every item listed in the search warrant is irrelevant.

b. The search warrant did not violate the Fourth Amendment's particularity requirement because it contained limiting language.

General exploratory searches are unreasonable. Thein, 138 Wn.2d at 149. A determination that a warrant meets the particularity requirement of the Fourth Amendment is reviewed *de novo*. State v. Stenson, 132 Wn.2d 668, 691, 940 P.2d 1239 (1997). The person executing the warrant must be able to identify the property to be seized with reasonable certainty. Id. at 691-92.

> General warrants, of course, are prohibited by the Fourth Amendment. "The problem [posed by the general warrant] is not that of intrusion, *per se*, but of a general, exploratory rummaging in a person's belongings. . . ."

Id. at 691 (internal cites omitted). When the precise identity of items to be sought cannot be determined at the time the warrant is issued, a generic or general description is sufficient when probable cause is shown and it is impossible to give a more specific description. Id. at 692.

Hudspeth claims that the search warrant failed to describe the things to be seized with sufficient particularity. Appellant's Brief at 12. But courts have often stated "The fact that a warrant lists generic classifications, such as business records or certain kinds of documents, does not necessarily result in an impermissibly broad warrant." Stenson, 132 Wn.2d at 692 (citing State v. Riley, 121 Wn.2d 22, 28, 846 P.2d 1365 (1993)). The Ninth Circuit has also reasoned that ""[r]eference to a specific illegal activity can . . . provide substantive guidance for the officer's exercise of discretion in executing the warrant."" State v. Perrone, 119 Wn.2d 538, 555, 834 P.2d 611 (1992)(quoting U.S. v. Spilotro, 800 F.2d 959, 964 (9th Cir. 1986)); see also U.S. v. Washington, 797 F.2d 1461, 1472 (9th Cir. 1986)(a search limited to items evidencing "involvement

and control of prostitution activity" satisfy the particularity requirement.).

In Stenson, the defendant argued that the search warrant was invalid because it was "broadly phrased and contained no limit." Id. at 692. Rejecting the defendant's claim, the court emphasized that the search warrant did contain limiting language: "Evidence of a business relationship and financial records, cash brought to the location by Mr. HOERNER in a black brief case, personal records, correspondence, photographs and film which may indicate a relationship or association between the STENSONS and HOERNERS. . . ." Id. at 689 (emphasis in original). Stenson therefore concluded that the defendant's search warrant was "not impermissibly broad, as it limited the search for, and seizure of, business, financial and personal records to those indicating a relationship between the Hoerners and the Stensons." Id. at 693-94.

In this case, for each item that Hudspeth claims was not described with sufficient particularity, the search warrant limited the items to be seized by referencing specific illegal activity. The search warrant, for instance, sought "notes and/or records and/or ledgers . . . , *evidencing the acquisition, manufacture and/or*

distribution of controlled substances. . . ." [CP 52 (emphasis added)] It also sought "records *evidencing income from sales of controlled substances. . . .*" Id. (emphasis added).

Similarly, the search warrant limited the "monies," "weapons," and "personal property" or "assets" to be seized: (1) "monies" could not be seized unless they were "*acquired from proceeds of sales of controlled substances and otherwise seizable under RCW 69.50.505*;" (2) "weapons" could not be seized unless they were authorized "*under RCW 9.41.098 and 69.50.505*;" and (3) "personal property" or "assets" could not be seized unless authorized "*under RCW 69.50.505.*" Id. (emphasis added). Hudspeth's argument ignores the warrant's limiting language.

Hudspeth's claim that the search warrant sought items protected by the First Amendment and therefore should have been described with "the most scrupulous exactitude" is without merit:

> [T]he "things to be seized" is to be accorded the most scrupulous exactitude when the "things" are books, and the basis for their seizure is the ideas which they contain. . . . [But] books which are merely ledgers of unlawful enterprise [are] not subject to [the] standard applied to materials protected by the First Amendment. . . .

Perrone, 119 Wn.2d at 547-48(citing U.S. v. Espinoza, 641 F.2d 153 (4th Cir. 1981)). The search warrant in this case did not list

any books—and it did not seek to seize any item because of an expressed "idea." But more importantly, the items actually sought by the search warrant are not protected by the First Amendment. See Perrone, 119 Wn.2d at 548.[8]

2. The trial judge's denial of Hudspeth's Motion for New Attorney did not constitute an abuse of discretion because he inquired into the alleged conflict, allowing Hudspeth and his counsel to fully express their concerns.

Defendants do "not have an absolute, Sixth Amendment right to choose any particular advocate." State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004)(citing Stenson, 132 Wn.2d at 733). "To justify appointment of new counsel, a defendant "must show good cause . . . such as conflict of interest, an irreconcilable conflict, or a complete breakdown of communication between the attorney and the defendant."" Varga, 151 Wn. 2d at 200 (citing Stenson, 132 Wn.2d at 734)). Defendants' loss of confidence or trust in their counsel is not sufficient reason to appoint new counsel. Varga, 151 Wn. 2d at 200 (citing Stenson, 132 Wn.2d at 734)).

[8] While the State strongly believes that Hudspeth's search warrant is supported by probable cause and describes the items to be seized with sufficient particularity, "the severability doctrine" can save valid portions of an overbroad warrant. Perrone, 119 Wn.2d at 556. The seizure of Hudspeth's firearms, narcotics, and drug paraphernalia was proper—and therefore should not be suppressed even if other aspects of the search warrant are found to be invalid.

In reviewing a lower court's denial of substitution, appellate courts evaluate three factors: "the timeliness of the motion, the adequacy of the lower court's inquiry into the defendant's complaint, and whether the asserted conflict created a total lack of communication such that the defendant was unable to present an adequate defense." U.S. v. Garcia, 924 F.2d 925, 926 (9th Cir. 1991)(citing U.S. v. Gonzalez, 800 F.2d 895, 898 (9th Cir. 1986)); see also State v. Cross, 156 Wn.2d 580, 607, 132 P.3d 80 (2006). A trial court's denial of substitution will not be disturbed absent an abuse of discretion. Varga, 151 Wn. 2d at 200 (citing Stenson, 132 Wn.2d at 733-34)).

Hudspeth claims "the trial court abused its discretion by failing to adequately inquire into the conflict. . . ." Appellant's Brief at 17. In Garcia, the Ninth Circuit held that the district court did not abuse its discretion in denying the defendant's motion to substitute counsel. Id. at 926. Garcia reasoned (1) that the defendant's motion was not timely because it "was made a mere six days before his first trial was scheduled to begin," id., and (2) that there was no evidence the alleged conflict hindered the presentation of the defendant's defense, id. at 927. The Ninth Circuit also explained that "the district court conducted an inquiry sufficient to

conclude that Garcia's complaints were without merit.[9] A trial court may not summarily refuse to allow the substitution of attorneys, but must conduct "such necessary inquiry as might ease the defendant's dissatisfaction, distrust, and concern."" Id. at 926 (quoting Hudson v. Rushen, 686 F.2d 826, 829 (9th Cir. 1982)).

In Hudson, the Ninth Circuit also analyzed the adequacy of the trial court's inquiry, concluding that it "was as comprehensive as the circumstances reasonably would permit." Id. at 831. Hudson's analysis regarding whether the trial court's inquiry was sufficient is illustrative:

> It is true the state trial court could have asked the defendant a series of pointed questions that inevitably would have resembled cross-examination regarding the validity of his defense. However, we are convinced after reading the transcript of the state trial that the trial court knew what the defendant's defense was, that trial counsel had consulted sufficiently with the defendant, that trial counsel was prepared, and that his advice to the defendant to testify was not aberrational. . . .
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> The record explicitly reveals that, unlike the summary denial in Brown v. Craven[10] . . . the court convened a session out of the presence of the jury at which defendant's complaint was aired. The court invited defendant to make a statement, listened to

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[9] In Garcia, the record indicated "that the district court held a hearing and entertained written declarations from both Garcia and his attorney regarding the motion." Id. at 927.

[10] Brown v. Craven, 424 F.2d 1166, 1169 (9th Cir. 1970).

> defendant's reasons for desiring new counsel, and found them to be without merit.

Id. at 832 (internal citations omitted). Washington's courts have echoed Garcia's and Hudson's reasoning: "a trial court conducts adequate inquiry by allowing the defendant and counsel to express their concerns fully." State v. Schaller, 143 Wn. App. 258, 271, 177 P.3d 1139 (2008)(citing Varga, 151 Wn.2d at 200-01). "Formal inquiry is not always essential where the defendant otherwise states his reasons for dissatisfaction on the record." Schaller, 143 Wn. App. at 271 (citing U.S. v. Willie, 941 F.2d 1384, 1391 (10th Cir. 1991)).

In this case, the trial judge conducted an adequate inquiry because he afforded Hudspeth the opportunity to explain the reasons for his dissatisfaction with his counsel. 06/13/11 RP 4-5. Hudspeth told the judge that he felt that his attorney was ignoring him. Id. The trial judge went on to question his attorney about the merits of Hudspeth's complaint. Id. at 5-6; see also Stenson, 132 Wn.2d at 737 (holding that the trial judge's denial of new court appointed counsel did not constitute an abuse of discretion because he considered the defendant's complaints and evaluated counsel's performance).

In response, Hudspeth's attorney told the judge that he prepared a brief, that he filed it with the court, and that he sent a copy to Hudspeth. 06/13/11 RP 5. His attorney also said that he was prepared for both Hudspeth's 3.6 hearing and for his trial. Id. at 5-6. Notably, the trial judge confirmed that Hudspeth's attorney had filed his brief, stating that "I've seen the brief . . . well, *this is the brief and I'm not sure why you don't have it.*" Id. at 7.

The record in this case indicates that the trial court's inquiry was adequate because it allowed Hudspeth to fully express his concerns for the record, which made a more formal, specific inquiry unnecessary. See, e.g., Schaller, 143 Wn. App. at 271. Additionally, the trial judge indicated that an appointment of different counsel would delay the start of Hudspeth's trial. 06/13/11 RP 7. And because Hudspeth actually admitted that he "like[d]" his attorney, there was no evidence of "an ethical conflict" that would prohibit Hudspeth from asserting an adequate defense. Id. at 4-6. Hudspeth has therefore failed to show that the trial judge's denial of

his motion constituted an abuse of discretion. See Varga, 151 Wn. 2d at 200.[11]

3. Hudspeth did not receive ineffective assistance of counsel (1) because his attorney's performance was not deficient, and (2) because even if his attorney's performance was deficient, it was not prejudicial to Hudspeth's case.

While appellate courts review claims of ineffective assistance of counsel *de novo* after considering the entire record, State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995)(citing Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir. 1988)—their review always begins with a strong presumption that counsel's performance was effective, Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). As with all ineffective assistance of counsel claims, the Strickland rule still governs: appellants must show (1) that counsel's performance was deficient and (2) that counsel's deficient performance was prejudicial to their case. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)(quoting Strickland, 466 U.S. at 687).

[11] After the judge denied Hudspeth's Motion to Suppress, Hudspeth again asked the court to give him a new attorney: ". . . I don't feel I was properly represented today." 06/13/11 RP 61-62. Because the judge had just denied Hudspeth's Motion for New Attorney, he refused to entertain Hudspeth's request. Id. at 62. The judge did, however, suggest that Hudspeth could file a petition for discretionary review. Id.

As to Strickland's first prong, appellants must show that their "counsel's representation fell below an objective standard of reasonableness based on consideration of all of the circumstances." Thomas, 109 Wn.2d at 226 (citing Strickland, 466 U.S. at 688). To meet the requirement of the second prong, appellants must show that ""there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."" Thomas, 109 Wn.2d at 226 (emphasis from original removed)(quoting Strickland, 466 U.S. at 694). Appellant courts are not required to address both prongs of the test if the appellant makes an insufficient showing on either prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1986) (*superseded by statute on other grounds*). Courts may therefore dispose of an appellant's ineffectiveness claim on the ground of lack of prejudice. Strickland, 466 U.S. at 697.

Hudspeth claims that his counsel unreasonably failed to argue that the search warrant was overbroad. Appellant's Brief at 22. But as argued above, the search warrant was not overbroad because the facts in Officer Finch's affidavit established that there was a probability that criminal activity was occurring at his home;

and the warrant only permitted the seizure of specific items that involved illegal activity. The trial judge would have therefore overruled an objection to the search warrant as overbroad.

Hudspeth also appears to argue that his attorney's performance was deficient because his Motion to Suppress contained two obvious factual errors and because his attorney failed to contact Hudspeth's witnesses. Appellant's Brief at 18-19. Hudspeth is right that his attorney mistakenly argued that there is nothing "in the search warrant itself that authorizes the search and seizure of handguns," 06/13/11 RP 10, but that does not mean that his attorney's performance was ineffective, see Thomas, 109 Wn.2d at 226 (quoting Strickland, 466 U.S. at 694). If an attorney's mistake meant that his or her performance was automatically ineffective, courts would be flooded with claims of ineffective assistance. The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire record, it can be said that the accused was afforded effective representation and a fair and impartial trial. State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967); State v. Bradbury, 38 Wn. App. 367, 370, 685 P.2d 623 (1984). Thus, "the purpose of the effective assistance guarantee of the Sixth Amendment is not to

improve the quality of legal representation", but rather to ensure defense counsel functions in a manner "as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688-689; *See* Powell v. Alabama, 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158 (1932). This does not mean, then, that the defendant is guaranteed *successful* assistance of counsel, but rather one which "make[s] the adversarial testing process work in the particular case." Strickland, 466 U.S. at 690; State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978); State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

The second "obvious factual error" that Hudspeth alleges is not even an error. Appellant's Brief at 19. At Hudspeth's CrR 3.6 hearing, his attorney argued that the officers opened the locked container before seeking an addendum because the time on the Inventory and Receipt of Property chart—which listed items found in locked containers—was *before* the time on the addendum. 06/13/11 RP 47. But it does not follow that Hudspeth's attorney's performance was deficient or that he committed an error just because the judge did not find his argument convincing.

Finally, Hudspeth asserts that his attorney's performance fell below an objective standard of reasonableness because he had not

contacted Hudspeth's witnesses, even though trial was scheduled to start the following week. Appellant's Brief at 18 (citing State v. *A.N.J.*, 168 Wn.2d 91, 225 P.3d 956 (2010)). But we do not know whether his attorney contacted the witnesses Hudspeth asked him to contact; we only know that Hudspeth said that his attorney had not "contacted any of my witnesses." 06/13/21 RP 4. Moreover, *A.N.J.* does not hold that attorneys commit ineffective assistance of counsel if they fail to contact the witnesses their clients ask them to contact—it held that counsel's failure to evaluate the evidence before advising his client to enter a plea constituted ineffective assistance. Id. at 111-12. Hudspeth has not produced any evidence that indicates his attorney failed to evaluate the evidence in his case.

4. The evidence in this case was sufficient to prove that Hudspeth was armed with a firearm because his guns were in an unlocked container within an arm's reach of his bed—which were all in a nine-by-six-foot room.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's

evidence and all inferences that reasonably can be drawn therefrom." Id. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303 (1992).

Credibility determinations are for the trier of fact and are not subject to review, State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990), as a reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence, State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

Hudspeth argues that his Fourteenth Amendment right to due process was violated because the evidence was insufficient to prove that he was armed with a firearm. Appellant's Brief at 23. To support his claim, Hudspeth analogizes his case to State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). In that case, the court stated that "[o]n this record, evidence that an unloaded rifle was found under the bed in the bedroom, *without*

more, is insufficient to qualify Valdobinos as "armed" in the sense of having a weapon accessible and readily available for offensive or defensive purposes." Id. (emphasis added). Evidence in Valdobinos indicated only that the defendants had an unloaded rifle under a bed in their home. Id.

Hudspeth also cites to State v. Brown, 162 Wn.2d 422, 173 P.3d 245 (2007). There, the court held that the lower courts "failed to correctly apply the 'nexus test' to determine whether [the defendant] was armed for first degree burglary and the firearm sentence enhancement." Id. at 430.

> Our cases have recognized that the mere presence of a deadly weapon at the scene of the crime, mere close proximity of the weapon to the defendant, or constructive possession alone is insufficient to show that the defendant is armed. *A person is armed with a deadly weapon if it is easily accessible and readily available for use for either offensive or defensive purposes. And there must be a nexus between the defendant, the crime, and the weapon*. To apply the nexus requires analyzing "the nature of the crime, the type of weapon, and the circumstances under which the weapon is found."

Id. at 431 (emphasis added)(internal cites removed). While Brown does lay out the applicable law, its facts are easily distinguishable from this case.

In that case, the defendant and his accomplice were burglarizing the victim's home and, at one point, the defendant removed the victim's rifle from his closet, placing it on the victim's bed. Id. at 430. He also found the victim's gun clip, which he placed on the bed near the rifle. Id. While the two men continued ransacking the victim's home, the victim returned and interrupted their burglary. Id. The defendant and his accomplice immediately fled the scene upon the victim's arrival—leaving *all* of the victim's possessions in his home. Id. at 425-26. Holding that the defendant was not "armed" while burglarizing the victim's home, Brown emphasized that even when the evidence is viewed most favorable to the State, "Showing that a weapon was accessible during a crime does not necessarily show a nexus between the crime and the weapon." Id. at 432.

Explaining what exactly the nexus requires, Brown mentioned State v. Eckenrode, 159 Wn.2d 488, 493, 150 P.3d 1116 (2007), which is analogous to this case:

> In Eckenrode, police responded to Eckenrode's report of an intruder in his home. Police arrived and swept the house, finding inside the home a loaded rifle, an unloaded pistol, and evidence of a marijuana growing operation. Police arrested Eckenrode in his front yard, "far from his weapons." Reviewing the facts, [the court] said:

> The rifle was loaded at the time, and Eckenrode testified that the pistol was as well. Eckenrode also had a police scanner, which, together with his manufacturing operation, raises the inference that he was monitoring police activity against the chance he might be raided. Finally, evidence of the drug manufacturing operation pervaded the house. A jury could readily have found that the weapons were there to protect the criminal enterprise.

Brown, 162 Wn.2d at 433-34 (emphasis removed from original) (quoting Eckenrode, 159 Wn.2d at 494). Like the defendant in Eckenrode, Hudspeth was arrested outside, away from his weapons. 06/21/11 RP 46-47. Testimony at trial indicated that at least one of Hudspeth's handguns was loaded, id. at 129; and that his semi-automatic handgun, revolver, and ammunition were in an unlocked box within two feet of his bed, id. at 63-64; 06/22/11 RP 245. Hudspeth's firearms were in the same room as his meth, marijuana, scale, tactical gear, camouflage bag with M-16 parts, and green gas mask pouch with M-16 parts. [CP 53.] Hudspeth also had a police scanner, 06/21/11 RP 59, which together with his narcotics operation "raises the inference that he was monitoring police activity against the chance he might be raided." Brown, 162 Wn.2d at 433 (quoting Eckenrode, 159 Wn.2d at 494). Notably, all

of these items were within Hudspeth's nine-by-six-foot room when police arrived. [CP 53.]

Claims of insufficiency admit the truth of the State's evidence, which in this case proves that Hudspeth was "armed" with a firearm. See Salinas, 119 Wn.2d at 201. Hudspeth's firearms were easily accessible and readily available, [CP 53.]; and the evidence also proved that Hudspeth's weapons provided him with security for his narcotics operation, 06/21/11 RP 59. The evidence is therefore sufficient to prove that Hudspeth was "armed" with a firearm within the meaning of the statute.

5. The firearm enhancements were properly charged and the jury verdict forms were correct. Even if that were not true, Hudspeth did not object at trial and, because he is unable to establish a manifest error affecting a constitutional right, this court should not address his claim.

RCW 9.94A.533 provides for a term of confinement, in addition to the standard range sentence, to be imposed when the defendant was armed with a firearm (subsection (3)) or a deadly weapon other than a firearm (subsection (4)). A sentencing enhancement must be based upon a jury finding. State v. Walker-Williams, 167 Wn.2d 889, 897, 225 P.3d 913 (2010). Hudspeth received a firearm enhancement based upon a special jury verdict

that he was armed with a firearm during the "unlawful possession of a controlled substance, methamphetamine, with intent to deliver, as charged in Count III." 06/22/12 RP 262.

The charging language alleged that Hudspeth "was armed with a deadly weapon, to wit: a firearm," and references both RCW 9.94A.533(3) and RCW 9.94A.825. [CP 2.] RCW 9.94A.533(3) specifies the time to be added when the defendant was armed with a firearm, and RCW 9.94A.825 states that

> In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, the court shall make a finding of fact of whether or not the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.
>
> For purposes of this section, a deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are included in the term deadly weapon: Blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive,

> and any weapon containing poisonous or injurious gas.

In the special jury verdict, the jury answered "yes" to the question of whether Hudspeth was "armed with a firearm" when he unlawfully possessed meth with intent to deliver. 06/22/12 RP 262. The jury was also given the following instructions:

> For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crimes in Counts III[12] and IV.[13] A person is armed with a firearm if at the time of the commission of the crime a firearm is easily accessible and readily available for offensive and defensive use. . . .
>
> A firearm is a weapon or device from which a projectile may be fired by an explosive, such as gunpowder.

06/22/12 RP 222-23. The jury was also told to answer the special verdict forms if it found Hudspeth guilty of Counts III and IV. Id. at 227. The special verdict form used the term "firearm," asking "Was the defendant, Aaron Michael Hudspeth, armed with a firearm at the time of the commission of the crime in Count III?" Id. at 262.

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[12] Count III charged Hudspeth with Possession of Methamphetamine with Intent to Deliver While Armed with a Firearm. [CP 2.]

[13] Count IV charged Hudspeth with Possession of Marijuana with Intent to Deliver While Armed with a Firearm. [CP 2.] As to Count IV, the jury returned a "not guilty" verdict. 06/22/12 RP 262.

Hudspeth argues that the sentencing court violated his constitutional rights to adequate notice by unlawfully imposing a firearm enhancement. Appellant's Brief at 26. He asserts that his firearm enhancement was improperly imposed because he was only charged with a deadly weapon enhancement—not a firearm enhancement. Id. at 28. Hudspeth claims that therefore the jury was only instructed on a deadly weapon enhancement (not a firearm enhancement), and that In re Pers. Restraint of Delgado, 149 Wn. App. 223, 204 P.3d 936 (2009), controls. Appellant's Brief at 26. Hudspeth's argument is without merit.

The State does not dispute that a defendant must be given notice in the charging language that a firearm enhancement is being sought. State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008). In this case, Count III and Count IV charged that Hudspeth was armed with a firearm, citing to both RCW 9.94A.533(3) (which specifies the additional time to be imposed for a firearm enhancement) and RCW 9.94A.825 (which defines a "deadly weapon" as "a revolver . . . or any other firearm," among other things). [CP 2-3.] There cannot be any serious doubt that Hudspeth had notice that the State was seeking a firearm enhancement.

The most recent authority from the Supreme Court regarding firearm and deadly weapon enhancements comes from Walker-Williams, which states that:

> ... only three options exist. First, if the jury makes no finding, no sentence enhancement may be imposed. Second, where the jury finds the use of a deadly weapon (even if a firearm), then the deadly weapon enhancement is authorized. Finally, where the jury finds the use of a firearm, then the firearm enhancement applies.

Id. at 901. It appears as though Hudspeth's position is that because the words "deadly weapon" were included in the charging language, the court must stop reading after that term and ignore the word "firearm." Such an argument elevates form over substance to an absurd degree. A firearm is a category of deadly weapon and the verdict forms made it clear the jury was finding that the weapon was a firearm. In the three cases consolidated in Walker-Williams, the verdict forms only used the words "deadly weapon." Id. at 893-94, 898. The State agrees that if the word "firearm" had not been on the special verdict forms, only the lesser deadly weapon enhancement would apply. But in this case, there can be no doubt the jury found that Hudspeth was armed with a firearm—as the jury was instructed on the definition of firearm and evidence at trial

indicated that a firearm was involved. 06/22/12 RP 222-23; see, e.g., C.P. 47.

Hudspeth's claim that Delgado controls also fails. Appellant's Brief at 26. First, while the State alleged—as it also did in Delgado—that Hudspeth was "armed with a deadly weapon, to wit: a firearm," the State in Delgado did not specify that it was charging the defendants under former RCW 9.94A.510(3). Delgado, 149 Wn. App. at 229. Second, the trial court in Delgado asked the jury to return special verdicts if the defendant was "armed with a deadly weapon." Id. at 235. And, finally, the jury's instructions in Delgado did not define "firearm." Id. Hudspeth, unlike the defendant in Delgado, had notice that he was being charged under RCW 9.94A.533(3) (formerly RCW 9.94A.510(3)), [CP 2-3.]; the jury returned a special verdict that said he was "armed with a firearm," 06/22/11 RP 262; and the jury's instructions defined "firearm," id. at 223. The result in Delgado was correct for that case, but not Hudspeth's.

Moreover, Hudspeth did not object below to the instructions, or lack of instructions, that he now challenges. In general, an appellate court does not review claims of error not raised before the trial court. RAP 2.5(a); State v. Gordon, 172 Wn.2d 671, 676, 260

P.3d 884 (2011). To raise a claim for the first time on appeal, "the appellant must 'identify a constitutional error and show how the alleged error actually affected the [appellant]'s rights at trial.'" Gordon, 172 Wn.2d at 676 (citing to State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009), quoting State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007)). To constitute a manifest constitutional error there must be actual prejudice—"'practical and identifiable consequences in the trial of the case.'" Gordon, 172 Wn.2d at 676 (quoting Kirkman, 159 Wn.2d at 935). Even a manifest constitutional error can be harmless. Gordon, 172 Wn.2d at 676. The State bears the burden of establishing that the error is harmless. Id.

Even if there was error, which the State does not concede, none of Hudspeth's arguments demonstrate that he was in any way prejudiced. The firearm enhancements were clearly based upon the jury's findings that he was armed with a firearm. See, e.g., 06/22/11 RP 262. This court should not address this claim at all, but if it does, and if it also finds manifest constitutional error, the State asserts that such error would be harmless.

D. CONCLUSION.

Hudspeth has failed to show that the search warrant in this case was overbroad, that the trial judge abused his discretion by denying his motion for a new attorney, that he received ineffective assistance of counsel, that the evidence was insufficient to prove that he was armed with a firearm, or that the court unlawfully imposed a firearm enhancement.

The State respectfully asks this court to affirm Hudspeth's convictions.

Respectfully submitted this 23d day of February, 2012.

Carol La Verne, WSBA# 19229
Attorney for Respondent

THURSTON COUNTY PROSECUTOR

February 24, 2012 - 7:44 AM

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